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No. 79-2037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MISSOURI,
Petitioner,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does Section 1 of the Sherman Antitrust Act apply to a boycott, under which civil rights organizations and other such noncommercial associations decide not to hold conventions or meetings in states that have not yet ratified the Equal Rights Amendment, where the sole objective is to promote ratification of the amendment?

2. Is a civil rights organization exercising privileges secured to it by the First Amendment when, in order to promote ratification of the Equal Rights Amendment, it urges other noncommercial associations to decide not to hold conventions or meetings in states that have not yet ratified the ERA?

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves an unprecedented—and unsuccessful—attempt to employ the Sherman Act to stop a civil rights organization from advocating a boycott for the sole purpose of promoting ratification of the Equal Rights Amendment ("ERA") to the United States Constitution.

In 1890, Congress passed the Sherman Antitrust Act in order to preserve "free and fair competition" against the growing economic power of business trusts. 21 Cong. Rec. 2457 (1890) (remarks of Senator Sherman). In

1978, the State of Missouri attempted to use the Sherman Act to stop the National Organization for Women, Inc. ("NOW") from publicizing and advocating the "ERA boycott." This is the term given to describe the actions of NOW and approximately 300 other noncommercial organizations that have adopted policies not to hold conventions or meetings in states such as Missouri that have not yet ratified the ERA. The organizations include women's groups like the American Association of University Women and the League of Women Voters, religious groups like the American Jewish Congress and the National Council of Churches, civil rights organizations like the American Civil Liberties Union, labor groups like the National Education Association and the United Auto Workers, political organizations like the Democratic National Committee and Common Cause, professional societies like the American Public Health Association and the American Psychological Association, and the governments of cities and counties including Seattle, Baltimore, Detroit, Cincinnati, and the District of Columbia. None of these entities seeks any economic gain by its policy. As Missouri itself stipulated, and as the courts below held, each of the organizations that has adopted such a policy has done so in pursuit of a political goal—the ratification of the ERA. (A.61)

The complaint filed by the State of Missouri, suing as *parens patriae*, alleged that these hundreds of noncommercial organizations are engaged in a conspiracy in restraint of trade—a group boycott—in violation of Section 1 of the Sherman Act, as well as a comparable provision of Missouri's state antitrust law; the same acts were also alleged to be tortious—the intentional infliction of harm to the economy of Missouri without legal justification.

NOW, the sole defendant named in the State's complaint, is a nonprofit civil rights organization formed in

1967 to bring women into full participation in the mainstream of American society. The complaint sought a broad injunction prohibiting NOW from continuing to publicize and advocate the ERA boycott.[1]

After extensive discovery proceedings, the case went to trial on October 30, 1978. The parties stipulated at the outset that the only goal of NOW's advocacy of the convention boycott was ratification of the ERA. (A.55) The district court heard testimony from 45 witnesses and received hundreds of pages of exhibits and deposition transcripts into evidence. This extensive record showed that political boycotts have been used since before the Republic was founded as a means of dramatizing grievances and giving them wider publicity. In recent times, boycotts have been used for these purposes in the drive for racial equality, in the consumer movement, and to protest antiunion tactics by grape and lettuce growers and by J.P. Stevens & Co. Just in the past few months,

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[1] Two days after Missouri filed this lawsuit, the State of Nevada filed a complaint against NOW that repeated verbatim the jurisdictional and Sherman Act allegations of Missouri's complaint. State of Nevada v. NOW, C.A. No. CV-LV-78-28, RDF. (D.Nev.). By stipulation of the parties, that case has been held in abeyance pending disposition of Missouri's appeals from the adverse judgment of the district court.

A third lawsuit, which again copied the federal law allegations of Missouri's complaint, was filed against NOW on May 8, 1978, by a private organization in Louisiana. Action Committee for Tourism, Inc. v. NOW, C.A. 78-1510-H. (E.D. La.) That case was commenced after Louisiana's Attorney General refused to sue NOW, based on his conclusion that the ERA boycott was a political activity not subject to the Sherman Act and that a suit to enjoin NOW from advocating the boycott would violate the boycotting organizations' First Amendment rights of freedom of expression and assembly. The Louisiana lawsuit has been dismissed pursuant to the parties' stipulation.

longshore workers have refused to handle cargo originating in the Soviet Union to protest the Soviet invasion of Afghanistan, and a prominent conservative leader, Richard Viguerie, has urged businesses and consumers to boycott French products in retaliation for France's decision to participate in the Moscow Olympics (a decision which was a refusal to participate in a political boycott conceived and advocated by the President of the United States). In the case of the ERA, organizations adopted boycott policies to counteract what they believed were unfair political tactics by ERA opponents and also to demonstrate the depth of their support for the ERA, which many opponents had characterized as a trivial issue supported only by radical fringe groups. (A.61)

The district court denied Missouri's request for injunctive relief and entered judgment for NOW, relying heavily on this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The court determined that application of the Sherman Act to NOW's boycott advocacy "would involve serious questions concerning the right of petition and the freedom of association protected by the first amendment" and held that the Sherman Act did not apply to the ERA boycott. (A.80) The district court also held that the Missouri antitrust laws, which are to be construed in a manner consistent with the federal antitrust laws, did not apply to NOW's actions. (A.81) As for the State's tort claim, NOW's actions were held to be privileged because they involved the right to petition and to political association. (A.81-2)

The court of appeals affirmed. It, too, placed particular emphasis on *Noerr* and noted that NOW's boycott efforts in support of ratification of the ERA are even "further afield from the central focus of the Sherman Act" than were the efforts of the railroads to achieve anticompetitive commercial legislation that *Noerr* held

to be beyond the scope of the Sherman Act. (A.23) The court concluded that NOW's boycott activities are privileged against challenge under the Sherman Act, Missouri antitrust and common law tort theory. (A.37-8)

ARGUMENT

In this case Missouri asks this Court to review the refusal of the lower courts to label a boycott engaged in by several hundred civil rights organizations and other noncommercial associations, which has as its sole objective promoting ratification of the ERA, an illegal conspiracy in restraint of trade. The State asserts that the decision below is a novel departure from prior decisions of this Court that threatens the very basis of the American form of government. Missouri's overblown claims notwithstanding, for several reasons the case does not warrant plenary review in this Court.

I.

Missouri correctly asserts that the precise question raised by its complaint has not been previously ruled upon by any court. Simply because the issue is novel, however, does not mean that it is controversial or unsettled. So far as we are aware, Missouri's lawsuit, and the tag-along cases filed in Nevada and Louisiana, represent the first and it is hoped the last time in the 90-year history of the Sherman Act that anyone has attempted to use that law as a tool to thwart the concerted political activities of civil rights groups. If similar lawsuits are attempted in the future, the lower courts are likely to recognize them for what they are and dispose of them without the need for any further guidance of this Court.

Recently, for example, the Fifth Circuit prevented an analogous effort to use state antitrust laws as a weapon against civil rights activities. *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert.*

denied, 100 S.Ct. 1020 (1980). That case involved a boycott conducted by the NAACP and other civil rights organizations against white businesses in Port Gibson, Mississippi, to protest racial discrimination in that city. The court of appeals held that the state's antitrust laws could not be employed to prevent boycotts intended to achieve political results. The court noted that the boycotting groups were not in competition with the boycotted businesses, nor were they motivated by economic interests, but rather were engaged in picketing, speeches, and other communication "directed to the elimination of racial discrimination in the town." 595 F.2d at 303. Such activities, the court found, constitute "essential political speech lying at the core of the First Amendment." *Ibid.* The court then cited with approval the decision of the district court in this case that "the Sherman Act's prohibition against concerted refusals to deal does not reach boycotts that are intimately bound up with political speech and unrelated to any economic interests." *Id.* at 304.

The First Circuit rebuffed an attempt to use the Sherman Act for political purposes in *Council for Employment and Economic Energy Use* v. *WHDC Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979). The Council, a political committee, claimed that four radio broadcasters had violated the Sherman Act by agreeing on the amount of free advertising time to provide to opponents of the Council's position on a referendum issue. The court held that the Sherman Act did not apply to such a situation involving access to the media "by expressly political organizations for the purpose of influencing political decisions of the general electorate." 580 F.2d at 12.

There is no more reason for the Court to grant Missouri's petition than there was to grant the petitions in the above cases. In all three instances, the lower courts readily concluded that antitrust principles cannot over-

ride fundamental First Amendment guarantees of political speech and association. That conclusion, while important, does not give rise to any question requiring resolution by this Court.

II.

The State's contention that the court of appeals' ruling is contrary to this Court's decisions in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), is farfetched. The holding in this case is not only consistent with those decisions; it is an *a fortiori* application of the holding in *Noerr* and its progeny.

Even before the decision in *Noerr*, this Court had long construed the Sherman Act to apply only to commercial activities or competitive business enterprises. Thus, the Court has referred to the Sherman Act as relating to "business competition," *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 n. 15 (1940), and as being aimed at "combinations of business and capital organized to suppress commercial competition," *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944). It described boycotts as "concerted refusals by traders to deal with other traders," *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), and in the same case stated that the Sherman Act

> "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." 359 U.S. at 213 n. 7.

In *Noerr*, the Court held that the Sherman Act does not apply to commercial entities when the challenged activities, although having an anticompetitive purpose, are political. Specifically, the Court concluded that the

Sherman Act did not reach concerted activity by railroads to obtain legislation that would "destroy the truckers as competitors for the long-distance freight business." 365 U.S. at 138. The Court found that the application of the antitrust laws in such a context "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137. Furthermore, as the Court subsequently clarified in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972), to apply the antitrust laws in the political context "would be destructive of rights of association and of petition."

In the face of that holding, Missouri repeats its argument, made unsuccessfully to both lower courts, that in *Noerr* only the legislation solicited by the railroads harmed their competitors, whereas in the present case the actions of NOW and other boycotting organizations allegedly caused the harm. Accordingly, Missouri claims, the present facts do not fit within the "exemption" to the antitrust laws created by *Noerr*. (Petition at 20)

As the courts below properly found, nothing in *Noerr* or subsequent decisions of this Court supports such a narrow interpretation of the holding in that case. In *Noerr*, the Court described the railroads' campaign against their trucking competitors as a "no-holds-barred fight," 365 U.S. at 144, involving the use of unfair and illegal tactics, *id.* at 129-30, the effect of which was "to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly. *Id.* at 142. Yet the Court held that: "Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. *Id.* at 140.

That conclusion was reaffirmed in *City of Lafayette, supra,* where the Court held that when municipalities compete with private enterprise as "providers of services," 435 U.S. at 403, they are not exempt from the antitrust laws simply by virtue of their status as units of government. In reaching that decision, however, the Court noted that the Sherman Act did have limited application to the political sector; one of the limits, as expressed in *Noerr*, is that "regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws." *Id.* at 399.

Missouri's claim that the court below created another "exemption" to the antitrust laws, contrary to the policy enunciated in *City of Lafayette*, misses the point of that decision. As the Court there recognized, *Noerr* does not merely establish an "exemption" to the Sherman Act. Instead, it expresses the limits of the Act as a matter of legislative intent and constitutional construction. The basis for the holding in *Noerr*, the Court said, was its recognition of the "possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the serious threat to First Amendment freedoms that would have been presented." 435 U.S. at 399 n. 17.

In light of these decisions, it would have been clear error for the court of appeals to hold that although the Sherman Act does not prevent a business combination from taking concerted political action to destroy its competitors, the same law prevents NOW and other noncommercial associations with no competitive motivation from taking concerted political action to gain ratification of the ERA. While such a ruling would have warranted review and reversal, the actual decision of the court

of appeals correctly applied the principles of *Noerr* and needs no further examination by this Court.[2]

III.

Finally, policy considerations, invoked here by the State, militate against the State's position, not in favor of it. Missouri's grim picture of the alleged effects of political boycotts on our system of government is supported neither by the record in this case nor by reality. The uncontroverted testimony of the expert political science witnesses in this case, and indeed any basic civics text, confirms that joint action by political interest groups similar to the action challenged here is not only an accepted but a necessary element of our system of government. Thus, the threat to our republican form of government does not arise from the decisions below; the threat is rather that Missouri's arguments, if accepted, would nullify the fundamental First Amendment guarantee of "freedom to associate with others for the common advancement of political beliefs and ideas." *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975), *quoting Kusper* v. *Pontikes*, 414 U.S. 51, 56 (1973).

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[2] We fail to see the relevance of Missouri's citation of Crown Central Petroleum Corp. v. Waldman, 1980-2 Trade Cas. ¶ 63,327 (M.D. Pa. 1980). (Petition at 13, 19) That was a case in which the district court, following its own understanding of the *Noerr* decision, simply held that although the defendants were business entities, as were the defendants in *Noerr*, they were engaged in concerted political activity to which the Sherman Act does not apply. *Id.* at pp. 75,682-3. The court arrived at that conclusion without relying on any ostensible expansion or extension of the *Noerr* doctrine created by the decision below. (Indeed, the only reference to this case was a *cf.* footnote citation to the district court opinion. *Id.* at p. 75,683 n.9.) But in any event, if in *Waldman* the district court's interpretation of *Noerr* was erroneous, the Third Circuit—and if necessary this Court—are available to correct the error.

That threat has been recognized by the courts in related contexts. In *Henry* v. *First National Bank of Clarksdale, supra,* the federal courts concluded that the attempt to use state antitrust laws to stifle a civil rights boycott was so outrageous that they took the exraordinary step of enjoining the enforcement of a state court judgment. One need only substitute "NAACP" for "NOW" and "Port Gibson boycott" for "ERA boycott" to see that the State's effort in this case is no less outrageous.

Missouri's fundamental error is its attempt to apply the commercial rules of the free market system to the political arena. In the commercial marketplace, concerted action among businesses is suspect in view of the free enterprise goals of the antitrust laws. Individual businesses are supposed to compete, not collaborate. In the political arena, the opposite attitude prevails. Concerted activity is a necessary corollary to free speech and hence is itself a valuable right encouraged and protected by the First Amendment. *See, e.g., Buckley* v. *Valeo,* 424 U.S. 1, 22 (1976); *Cousins* v. *Wigoda, supra; NAACP* v. *Alabama,* 357 U.S. 449, 460-61 (1958); *Thomas* v. *Collins,* 323 U.S. 516, 530-32 (1945).

In sum, the antitrust laws, based as they are upon the objectives of profit maximization inherent in the commercial world, have no legitimate application to the purely political and social goals espoused by NOW and other supporters of the ERA boycott. Under Missouri's theory, any organization that adopted a boycott resolution after becoming aware of NOW's advocacy of the ERA boycott would be guilty of joining an illegal conspiracy, even if the resolution reflected the strong desires of the organization's members or governing body. Such a pernicious rule of law would rob those organizations and their members of their rights of free speech and freedom of association and would thus be fundamentally inconsistent with the

First Amendment. The courts below recognized that fact and properly rejected the State's proposition.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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